83-5533

No. 83-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THOMAS GERALD LANEY,

PETITIONER,

vs.

STATE OF TENNESSEE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT

OF TENNESSEE

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QUESTIONS PRESENTED

1. Whether the trial Court's exclusion for cause of a potential juror who expressed a general and ambiguous objection to the death penalty violated the petitioner/defendant's constitutional protections established by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

2. Whether Tennessee Code Annotated, §39-2404, violates the constitutional protections established by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution by allowing the prosecution to use as an "aggravating circumstance" in a charge of felony murder the fact that the murder "was committed while the defendant was engaged in committing...any first degree murder, arson, rape, robbery, burglary..." [T.C.A. §39-2404(i)(7)]

3. Whether Tennessee Code Annotated, §39-2404 (g), which creates an impermissible presumption of death and unlawful shift in the burden of proof to the defendant when one or more aggravating circumstances are proved, is a violation of the constitutional protections afforded by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

4. Whether the trial Court's instruction to the jury as to all eleven aggravating circumstances and further instruction to the jury that they could find any or all of those aggravating circumstances, when the majority of the aggravating circumstances were neither advanced nor argued by the State, violated the petitioner/defendant's constitutional protections established by the Eighth and Fourteenth Amendments to the United States Constitution.

5. Whether the infliction of the death penalty under the facts and circumstances of the instant case constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

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TABLE OF AUTHORITIES

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Petitioner Thomas Gerald Laney respectfully prays that a writ of certiorari issue to review the Judgment of the Supreme Court of Tennessee.

CITATION TO OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Tennessee are reported at 654 S.W.2d 383 (Tenn. 1983) and are attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on June 27, 1983. A timely petition to rehear was denied on August 1, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3), petitioner having asserted below and is asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth Amendment to the Constitution of the United States, which provides in

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relevant part:

> "No person shall be held to answer for a capital crime...nor be deprived of life, liberty,...without due process of law."

and the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to...trial, by an impartial jury of the State..."

and the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be imposed, nor cruel and unusual punishment inflicted."

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any state deprive any person of life, liberty or property, without due process of law..."

2. This case also involves the Tennessee statute which provides for possible death penalty on conviction of murder in the first degree. The statute is codified in Tennessee Code Annotated, §39-2404 (now §39-2-203), a copy of which is attached hereto as Appendix B.

STATEMENT OF THE CASE

On December 11, 1980, petitioner Thomas Gerald Laney was indicted by the Sullivan County, Tennessee, Grand Jury for the first degree murder (felony murder) of Suleiman "Sam" Showkeir that occurred on October 16, 1980. On January 9, 1981, the defendant appeared with his attorney and was arraigned. Upon motion of the defendant for psychiatric evaluation, the trial judge ordered the defendant sent to Bristol Regional Mental Health Center for evaluation of his competency to stand trial and sanity at the time of the offense. On January 26, 1981, a letter from the Bristol Regional Mental Health Center, in which that center found the defendant to be competent to stand trial and found no sign of any major psychiatric disorder which would have prevented the defendant from adhering to the requirements of the law, was filed with the Court. On March 2, 1981, the Sullivan County Grand Jury presented the petitioner for first degree murder (felony murder) and he was arraigned on this resubmitted indictment on March 5, 1981.

Petitioner's trial before a jury commenced on his plea of not guilty on April 8, 1981, continued through and was completed on April 10, 1981. The jury found the petitioner guilty of first degree murder. On April 11, 1981, the jury, after hearing the evidence presented on aggravating and mitigating circumstances, and duly deliberating, fixed the defendant's punishment at death. The jury unanimously found the statutory aggravating circumstance contained in Tennessee Code Annotated, §39-2404 (i)(7), which reads as follows:

> "The murder was committed while the defendant was engaged in committing or was an accomplice in the commission of or was attempting to commit or was fleeing

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after committing or attempting to commit any first degree murder, arson, rape, robbery burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb."

The jury unanimously found that there were no mitigating circumstances sufficiently substantial to outweigh this statutory aggravating circumstance.

STATEMENT OF THE FACTS

Douglas Harris testified he was employed by the Kingsport Police Department and that on the evening of October 16, 1980, he was called to the home of Suleiman "Sam" Showkeir; that when he arrived at the scene there were other officers already present; he testified concerning the general description of Mr. Showkeir's home and the area surrounding that residence.

David Wood testified that Mrs. Showkeir came to a nearby market where he was visiting an employee, and that he and the employee returned with her to the Showkeir home where they found that Mr. Showkeir had been shot but had managed to get inside the house, and they further observed an individual with a mask on, lying in a puddle of blood on the carport, with a gun in his hand.

Robert Moore testified he was a Captain with the Kingsport Police Department; that he went to Holston Valley Community Hospital on the 23rd day of October, 1980, to interview the defendant, Thomas Gerald Laney; and that Laney gave him an oral statement in which he admitted having drunk several beers in Johnson City, Tennessee, then driving to and around Kingsport for a few minutes; Moore testified that Laney told him he didn't remember anything else that happened or where he went next, but did admit to owning a .38 caliber Colt Cobra.

Roger Goldsberry testified he was a Special Agent of the Federal Bureau of Investigation and was assigned as

an examiner in the firearms unit of the F.B.I. Laboratory. He testified that bullets found in Mr. Showkeir and at the residence were consistent in some respects with the bullets he test fired from the .38 caliber Colt Cobra, recovered from the scene.

Dr. Cleland C. Blake testified that he is a board-certified forensic pathologist; that he performed an autopsy on Mr. Schowkeir; and that the cause of death was from internal bleeding.

Joann Christian testified she was the Assistant Director of Medical Records at Holston Valley Community Hospital; that according to Mr. Laney's hospital record a test for blood alcohol revealed a level of 155.

Dr. Cleland C. Blake testified from the hospital record introduced earlier and explained that the figure of 155 on the record shows that the defendant had a blood alcohol level of approximately .15 and that this could create a range of reaction in an individual from an affect that is barely discernible to almost a stupor.

The jury returned a verdict of guilty of murder in the first degree.

The sentencing phase of the trial began on April 11, 1981. The State relied upon the evidence previously presented.

Donald Jones testified he was a Professor of Psychology at East Tennessee State University; that he examined and administered intelligence quotient tests to the defendant; that he obtained an overall I.Q. of seventy-two (72) which would place him in a borderline mentally retarded range.

Shirley Laney Barwick, the defendant's oldest sister, testified that the defendant was a "follower", that he had difficulty in school, and that he left school while

in junior high.

Dr. Wendell Skinner testified the defendant had been shot four times: behind the ear, in the right arm, in the left leg, and in the right buttock.

The jury unanimously found that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance found by the jury, and the jury unanimously found that the punishment for the defendant should be death.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner's first ground for error in the Tennessee Supreme Court asserted that the trial Court charged the jury that they could find as the sole aggravating circumstance in a felony murder situation the aggravating circumstance contained in Tennessee Code Annotated §39-2404(i)(7), now Tennessee Code Annotated §39-2-203. The Tennessee Court rejected this argument and refused to overturn its holding in an earlier case. 654 S.W.2d at 387.

2. Petitioner argued that the trial Court erred in charging the jury over the objections of the defendant that they could find any of eleven (11) aggravating circumstances or any of eight (8) mitigating circumstances even though the majority of these were not supported by the proof nor advanced by the respective parties. The State conceded that the instructions were improper, but the Court held they did not prejudice the defendant's trial. 654 S.W.2d at 388.

3. Petitioner argued that the infliction of the death penalty in the instant case constitutes cruel and unusual punishment. The Tennessee Court rejected this contention. 654 S.W.2d at 389

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT'S EXCLUSION FOR CAUSE OF A

POTENTIAL JUROR WHO EXPRESSED A GENERAL AND AMBIGUOUS OBJECTION TO THE DEATH PENALTY VIOLATED THE CONSTITUTIONAL PROTECTIONS ESTABLISHED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The standard developed by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968), rehearing denied, 393 U.S. 898 (1968), and subsequent cases for excluding prospective jurors who oppose the death penalty is a very strict one: only jurors who are unequivocably opposed to the imposition of the death penalty may be excluded for cause. In Maxwell v. Bishop, 398 U.S. 262 (1970), this Court quoted a lengthy passage from Witherspoon:

> "As we made clear in Witherspoon, 'a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.' 391 U.S., at 522. We reaffirmed that doctrine in Boulden v. Holman, 394 U.S. 478. As we there observed, it cannot be supposed that once such people take their oaths as jurors they will be unable 'to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.' 394 U.S., at 484. 'Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position.' Witherspoon v. Illinois, supra, at 516 n.9." (398 U.S. at 265.)

Thus, a venireman must make it unmistakably clear and must state unambiguously that he would automatically vote against the imposition of capital punishment in order to pass muster under Witherspoon. The rule against exclusion also applies where a venireman equivocates concerning his or her capability to return a verdict of guilty. See Wilson v. Florida, 403 U.S. 947 (1971) (reversing Wilson v. State, 225 So.2d 321 (Fla. 1969); juror's scruples "very well might" affect his verdict; juror states he "would have difficulty" in finding defendants

guilty if the penalty may be death).

Further, the cases make it clear that the improper exclusion of even a single venireman violates the Witherspoon principle. See Davis v. Georgia, 429 U.S. 122 (1976).

In the case at bar, the petitioner contends that the trial Court committed reversible error, based upon the above-cited cases, by excusing a potential female juror who failed to make it unmistakably clear that she would vote automatically against the imposition of capital punishment. In each of her responses to questioning by the Court, she equivocates concerning her capability to impose the death penalty:

> "THE COURT: You could not vote for it. Would you automatically vote against it in any case regardless of the evidence in the case?
>
> MRS. ADDINGTON: I would vote against it. I wouldn't vote for it.
>
> THE COURT: You would vote against it?
>
> MRS. ADDINGTON: Against it. Against it.
>
> THE COURT: In any case?
>
> MRS. ADDINGTON: Well, I'd have to---I'd have to hear the case and all, but just---right now I couldn't be for it.
>
> THE COURT: I didn't hear the first part of your answer.
>
> MRS. ADDINGTON: I said I couldn't---right now I couldn't vote for it.
>
> THE COURT: But before that you said something else and I didn't hear it.
>
> MRS. ADDINGTON: Well, I said I'd have to hear all the evidence, but still I couldn't vote for it.
>
> THE COURT: Are you saying then that under some

circumstances you might be able to vote for it?

MRS. ADDINGTON: No, I don't think so.

[Trial Record, p. 297]
(emphasis supplied)

Her responses to the questioning by the State were equally as ambiguous. First, the excluded juror tells the prosecutor she doesn't "believe" she can impose the death penalty:

"GENERAL KIRKPATRICK: ...Would your opinion concerning capital punishment cause you to automatically vote against imposing the death penalty without regard to any evidence that might be presented at the trial...

MRS. ADDINGTON: No, I don't believe I can."

[Trial Record, p. 295]
(emphasis supplied)

However, after further questioning by both the Court and the prosecutor for the State, the potential juror states she would "vote against it" when asked if she could consider imposition of the death penalty in this case. She was then excused by the Court. [Trial Record, p. 299]

The petitioner contends that a Writ of Certiorari should be granted in this cause based upon the exclusion of the potential juror, as noted above, when such juror did not "unequivocably" and "unambiguously" state her opposition to the death penalty. It is worth expressly pointing out again to this Court that at one time the potential juror stated "Well, I'd have to--I'd have to hear the case and all..." [Trial Record, p. 297]. As stated earlier, the Witherspoon and subsequent line of cases make it clear that a veniremen must state unambiguously that he/she would automatically vote against the imposition of capital punishment.

The defendant's Sixth, Eighth, and Fourteenth

Amendment interests in a representative, impartial jury capable of reflecting contemporary community values in the capital sentencing process are all vitally compromised by the practice of excluding for cause veniremen who ambiguously state that they would not be able to impose capital punishment. It produces a jury that is more punitive and more likely to identify with the prosecution, in derogation of the defendant's rights to have an impartial jury. By removing a segment of the community which has a prevalent view about the death penalty, it severs the "link between contemporary community values and the penal system", Witherspoon, supra, at 391 U.S. 519., that is indispensable to assure the defendant's protection against the infliction of unduly harsh punishment.

Further, it has been clearly established that Witherspoon error is not waived by failure of defense trial counsel to object to the improper exclusion for cause of a prospective juror. The Supreme Court of the United States has implicitly held that error under Witherspoon v. Illinois, 391 U.S. 510 (1968), is fundamental and cannot be waived. "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty." Id. at 522 (emphasis added). Jury selection in violation of Witherspoon "necessarily undermine[s] ... 'the very integrity of the...process'" leading to the imposition of the death sentence, id. at 523 n.22; and the relinquishment of safeguards whose purpose is thus "to insure...the constitutional model of a fair criminal trial" has always been governed by "[a] strict standard of waiver," Schneckloth v. Bustamonte, 412 U.S. 218, 241 (1973).

The Court has therefore reversed a number of death sentences despite the lack of contemporaneous objection to the excusing of prospective jurors for cause in violation of Witherspoon. See, e.g., Boulden v. Holman, supra; Maxwell v. Bishop, supra; Wigglesworth v. Ohio, 403 U.S. 947 (1971), 91 S.Ct. 2284, 29 L.Ed.2d 857, Harris v. Texas, 403 U.S. 947 (1971).

Significantly, the lower court decisions reversed in Wigglesworth and Harris had held Witherspoon error waived because of the absence of timely objection. See State v. Wigglesworth, 18 Ohio St.2d 171, 248 N.E.2d 607 (1969); Harris v. State, 457 S.W.2d 903 (Tex. Cr. App. 1970).

II. TENNESSEE CODE ANNOTATED, SECTION 39-2404 (NOW 39-2-203) VIOLATES THE CONSTITUTIONAL PROTECTION ESTABLISHED BY THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY ALLOWING THE PROSECUTION TO USE AS AN "AGGRAVATING CIRCUMSTANCE" IN A FELONY MURDER SITUATION THE SPECIFIC STATUTORY AGGRAVATING CIRCUMSTANCE CONTAINED IN TENNESSEE CODE ANNOTATED, SECTION 39-2404(i)(7).

Tennessee Code Annotated, Section 39-2404 (now Section 39-2-203)* provides in part that upon conviction of murder in the first degree, the trial will then enter a sentencing phase in which the jury should determine whether certain specific aggravating and/or mitigating circumstances are present in the case. If the jury unanimously determines that no statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable doubt but that said circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. Tennessee Code Annotated, §39-2404(f). However, if at least one statutory aggravating circumstance or several aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or

*Tennessee Code Annotated, Section 39-2404 has been renumbered as Section 39-2-203. The old numbering will be used throughout this petition.

circumstances are not outweighed by any mitigating circumstances, the sentence shall be death, Tennessee Code Annotated, §39-2404(g).

The petitioner, Thomas Gerald Laney, was not charged with premeditated murder, but rather was charged with murder in the first degree in that he allegedly willfully took the life of a person in being during the attempted perpetration of a robbery; i.e., felony murder. Tennessee Code Annotated, Section 39-2404(i)(7), a "statutory aggravating circumstance", provides as follows:

> "The murder was committed while the defendant was engaged in committing or was an accomplice in the commission of or was attempting to commit or was fleeing after committing or attempting to commit any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb."

At the conclusion of the sentencing phase of the petitioner's trial, the jury returned a verdict of death by electrocution by finding the above-stated aggravating circumstance (Tennessee Code Annotated, §39-2404(i)(7)). The petitioner insists that "felony murder" should not be used as an aggravating circumstance in a case, such as his, where the felony murder rule has already been used to raise what would otherwise be a second degree murder to a first degree murder. At the sentencing hearing, the State used the evidence, introduced during the guilt phase, establishing robbery to show an aggravating circumstance for a sentence of death. The petitioner contends that since this evidence was relied upon during the guilt phase of the trial to establish murder in the first degree, and since, in the absence of the felony murder evidence at the guilt phase, the petitioner would have been guilty of no more than second degree murder, this evidence cannot show "aggravating circumstances". Once the underlying felony has been used to obtain a conviction of first degree murder, it becomes an

element of that crime and should not thereafter be the basis for additional prosecution or sentence. This reasoning has been followed by the Supreme Court of North Carolina in State v. Cherry, 257 S.W.2d 551 (N.C. 1979). However, the Tennessee Supreme Court rejected this argument, partly upon the basis of the United States Supreme Court's decision in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The Proffitt case is easily distinguishable from the case at bar upon its facts. In Proffitt, there was a substantial amount of evidence introduced concerning the defendant's premeditation and the trial judge, in his written findings supporting the sentence, found as aggravating circumstances the fact that (1) the murder was premeditated and occurred in the course of a felony; (2) the defendant had the propensity to commit murder; (3) the murder was especially heinous, atrocious and cruel; and (4) the defendant knowingly, through his intentional act, created a great risk of serious bodily harm and death to many persons. Proffitt, supra, 49 L.Ed.2d at 920. (emphasis added)

In the instant case, petitioner was not charged with premeditated murder, but was charged with felony murder in that the victim was killed during the attempted perpetration of a robbery. The State, during the guilt phase of petitioner's trial, introduced proof concerning the facts of the alleged felony murder. Once a conviction was obtained, the State relied upon the same evidence during the sentencing hearing. No additional evidence of aggravating circumstances was introduced by the State. Instead, it used the evidence establishing robbery to show an aggravating circumstance for a sentence of death---the same evidence which was necessary to uphold the petitioner's conviction for felony murder.

Again, the petitioner contends that once the

underlying felony, the attempted robbery, had been used to obtain a conviction of first degree murder (felony murder), it became an element of that crime and could not thereafter be the basis for additional prosecution or sentence. To allow the use of Tennessee Code Annotated, Section 39-2404(i)(7) in a charge of felony murder deprives the petitioner of his right to be free from double jeopardy. The proof in the case before the Court would not have supported a verdict of murder in the first degree but for the felony murder rule and, therefore, in this case absent any proof of premeditation or even an allegation of premeditation, the felony murder rule (1) has been used to raise what would otherwise be a second degree murder to a first degree murder and (2) used to enhance the punishment from life imprisonment to death in the electric chair.

The result is that the jury in a felony murder situation (when felony murder is used as a substitute for premeditation), upon returning its verdict of guilty of murder in the first degree beyond a reasonable doubt, has found and must have found statutory aggravating circumstance set out in Tennessee Code Annotated, Section 39-2404(i)(7), thereby placing the defendant in a position of mandatory sentence of death unless he can prove sufficient mitigating circumstances to outweigh the aggravating circumstance already found by the jury in the guilt phase of the trial.

The Tennessee legislature recently amended the "Criminal Sentencing Reform Act of 1982". Under that act, which provides for judge-sentencing in all cases except capital punishment, a defendant is given a range of punishment depending upon whether he is classified as a mitigated, standard, persistent, or an especially aggravated offender. See Tennessee Code Annotated, §40-35-101, et seq. The recent amendment provides as follows:

> "If one (1) or more of the circumstances set out in this section that elevate the commission of an offense to an especially aggravated offense are essential elements of the crime charged in the indictment, such circumstance or circumstances shall not be used to elevate such offense to an especially aggravated offense. Provided, however, other circumstances set out in this section that are not essential elements of the crime charged in the indictment may be used to elevate an offense to an especially aggravated offense." Chapter 406, Pub. Acts 1983, amending Tennessee Code Annotated, Ch. 35 of Title 40.

Although this amendment does not apply in the case of a capital offense, it does show the Legislature's concern and attitude toward increasing punishment based on a fact or circumstance that is an essential element of the underlying offense. Petitioner Gerald Laney would again point out that this is precisely what occurred in his case. He was charged with felony murder and found guilty of this offense by the jury. During the punishment phase of his trial, the State offered no new evidence to show an aggravating circumstance or circumstances, but relied upon the fact that the murder was committed during the commission of a felony (robbery). The jury returned its verdict of punishment by death based upon this fact.

III. TO ALLOW THE STATE TO USE FELONY MURDER AS AN AGGRAVATING CIRCUMSTANCE WHEN FELONY MURDER IS AN INDISPENSIBLE PART OF THE PRIMA FACIE CASE OF MURDER IN THE FIRST DEGREE CREATES AN UNLAWFUL SHIFT IN THE BURDEN OF PROOF.

Generally in a criminal case the prosecution bears both the production burden and the persuasion burden. (Citation omitted). Since in the situation described above, the Tennessee statute shifts the burden to the defendant, this statute must satisfy certain due process requirements, which upon examination, it does not. See Barnes v. U.S.,

412 U.S. 837 (p. 846 note 11); 93 S.Ct. 2357 (2363); Turner v. U.S., 396 U.S. 398, 90 S.Ct. 642 (1970). This is impermissible. "'The penalty of death is qualitatively different' from any other sentence." Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The only constitutionally permissible presumption must be life.

This shift of the burden violates the Due Process Clause as described in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975); In Re: Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068; Patterson v. New York, 432 U.S. 210, 97 S.Ct. 2319, 53 L.Ed2d 281.

In Mullaney, (supra), the statute required a defendant charged with murder, which upon conviction carried a mandatory sentence of life imprisonment, to prove that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter which carried a lesser sentence. The Court held that this scheme does not comport with the requirement of the Due Process Clause of the Fourteenth Amendment and that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged.

The Mullaney Court made it clear that the Winship ruling was not limited to only those facts that constitute a crime as defined by state law, but also factors that bear solely on the extent of punishment. The Court used the Maine statute as an "extreme example" of an unlawful shift in the burden of proof. The petitioner should not be required, as he was here, to come forward to prove a lesser penalty.

IV. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AS TO ALL ELEVEN (11) AGGRAVATING CIRCUMSTANCES AND FURTHER INSTRUCTION TO THE JURY THAT THEY COULD FIND ANY OR ALL OF THOSE AGGRAVATING CIRCUMSTANCES, WHEN THE MAJORITY OF THOSE CIRCUMSTANCES WERE NOT SUPPORTED BY PROOF AND NEITHER ADVANCED NOR ARGUED BY THE STATE, VIOLATED THE PETITIONER'S CONSTITUTIONAL PROTECTIONS ESTABLISHED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the case presently before the Court, the trial court instructed the jury as to all eleven aggravating circumstances contained in Tennessee Code Annotated, Section 39-2404(i); and further instructed the jury that they could find any or all of those aggravating circumstances. The petitioner contends that this violated his constitutional protections because the majority of the aggravating circumstances were neither advanced nor argued by the State. The Eighth Amendment to the Constitution of the United States prohibits trial judges from instructing the jury in a capital case that they can find certain facts or conclusions which are not supported by the proof. This is based upon the fact that such an instruction constitutes an invitation for the jury to disregard their oath.

The United States Supreme Court in Roberts vs. Louisiana, 428 U.S. 325, 49 L.Ed. 2d 974, 96 S.Ct. 3001 (1976), when dealing with a Louisiana murder statute that provided for a mandatory instruction of lesser offenses whether or not the proof would support such an instruction said:

> "Under the current Louisiana system, however, every jury in a first degree murder case is instructed on the crimes of second degree murder and manslaughter and permitted to consider those verdicts even if there is not a scintilla of evidence to support the lessor verdicts...This...plainly invites the jurors to disregard their oaths and choose a verdict for the lesser offense whenever they feel the death penalty is inappropriate. There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions..." 428 U.S. at 334, 335.

Although dealing with the sentencing phase rather than the guilt phase of the trial, the petitioner's case is substantially indentical to Roberts in that the jury was instructed that they could find any of eleven aggravating circumstances even though most of these circumstances were

not advanced nor argued by the State nor were they supported by any evidence.

By so instructing the jury, the Court clearly invites the jury to disregard their oath and find facts or circumstances not supported by the proof, which the Court held in violation of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

In the case at bar, the State of Tennessee conceded that the instructions were improper but maintained that they did not prejudice the petitioner's trial. The Supreme Court of Tennessee agreed. 654 S.W.2d at 388. Petitioner would contend that the trial Court's broad instructions did prejudice his trial, especially when coupled with the fact that the State relied on its evidence introduced during the guilt phase of petitioner's trial, to prove beyond a reasonable doubt the presence of an aggravating circumstance. In State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981), the Tennessee Supreme Court reversed the defendant's conviction when the trial judge instructed the jury on an aggravating circumstance not supported by the proof and the jury returned a verdict on that aggravating circumstance. On remand, the Court instructed the trial Court to instruct the jury as follows:

> "The murder was committed while the defendant was engaged in committing, or was attempting to commit robbery. Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear." 621 S.W.2d at 140.

The Tennessee Supreme Court ruled in the petitioner's case that a similar instruction should have been given, "since robbery is the felony relied upon by the State," 654 S.W.2d at 388, but refused to reverse the conviction, holding that "no prejudice resulted from the broad instructions given the jury" 654 S.W.2d at 389.

V. THE INFLICTION OF THE DEATH PENALTY, UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

During the sentencing phase of petitioner's trial, the petitioner called as a witness Donald R. Jones, a professor of psychology at East Tennessee State University. He testified that the petitioner's overall I.Q. was 72 which was in the borderline mentally retarded range. He further testified that, although the petitioner met the Graham test, his low intelligence limited his ability to conform his conduct to the law. Further, evidence was introduced which showed that the petitioner's blood alcohol level was at least .15 at the time of the commission of the offense. The petitioner would contend that because of these two (2) factors, his limited intelligence and his intoxication, the infliction of the death penalty upon him would constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Although the Supreme Court of the United States has held that the death penalty, per se, is not unconstitutional, Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), the petitioner contends that the facts of the case at bar should preclude the infliction of the death penalty.

CONCLUSION

For the foregoing reasons, petitioner contends that the Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

I, the undersigned, do hereby certify that I have this day mailed a true copy of the foregoing Petition for Writ of Certiorari to Wayne E. Uhl, Esq., Assistant Attorney General for the State of Tennessee at his office, James Robertson Parkway, Nashville, Tennessee.

This the_____day of September, 1983.

_____
Bob McD. Green

GREEN & GREEN
ATTORNEYS AT LAW
JOHNSON CITY, TENN.

APPENDIX 'A'

[17] We feel constrained to hold, in accordance with the majority of courts that have decided the issue, that jeopardy does not attach at a hearing on a guilty plea until the plea is unconditionally accepted. *See, e.g., Jeffrey v. District Court, Eighth Judicial District*, 626 P.2d 631, 636 (Col. 1981); *Odoms v. State*, 359 So.2d 1162, 1164 (Ala.Cr.App.1978); *Stowers v. State*, 266 Ind. 403, 363 N.E.2d 978, 982 (1977). Because defendant's plea was never accepted, jeopardy never attached and the trial court, therefore, was not prohibited by the double jeopardy clause from revoking its preliminary determination to reduce the charge as part of the plea negotiations. Until a final judgment is entered a court is free to reject the plea and plea agreement. *United States v. Sanchez*, 609 F.2d 761, 763 (5th Cir.1980). Rejection of one is rejection of the other. Where, as in this case, a court agrees to reduce a charge in order to facilitate a guilty plea but the plea is never accepted, trial on the original, greater charge is not prohibited by the double jeopardy clause.

The judgment of the Court of Criminal Appeals is reversed and the judgment of the trial court is reinstated. Costs are adjudged against appellee.

FONES, C.J., and BROCK, HARBISON, and DROWOTA, JJ., concur.

COOPER, Justice.

ON PETITION TO REHEAR

Michael Todd has filed a petition to rehear taking issue with this court's statement that the defendant moved, on the day of trial, to have the district attorney general file the order signed by the trial judge reducing the charge against defendant to voluntary manslaughter. Defendant points out that counsel earlier had filed a written motion seeking this relief. It is true that counsel filed a written motion prior to trial, but counsel made no effort to have the court rule on the motion until the day of trial. Neither did counsel submit an order to the court granting the motion until after defendant's notice of appeal had been filed. This was several months after trial and, consequently, the trial judge entered the order *nunc pro tunc*.

Defendant also takes issue with this court's determination that the trial judge did not unconditionally accept defendant's plea to the reduced charge of voluntary manslaughter. Out of deference to counsel, and in the interest of justice, we have again studied the record and briefs of the parties. We see no basis in the record for reversing our finding on this issue.

[18] Appellant also has called the court's attention to the fact that the Court of Criminal Appeals pretermitted two issues which the defendant deems to be important and asks for a remand to that court for a determination of the issues in the event this court found no merit in the primary issues raised by the petition to rehear. The defendant is entitled to this relief. Accordingly, the judgment of this court is modified to provide for remand of the case to the Court of Criminal Appeals for consideration of the pretermitted issues. The petition to rehear is in all other things denied. Costs of the petition to rehear are adjudged against petitioner.

FONES, C.J., and BROCK, HARBISON, and DROWOTA, JJ., concur.

STATE of Tennessee, Appellee,

v.

Thomas Gerald LANEY, Appellant.

Supreme Court of Tennessee,
at Knoxville.

June 27, 1983.

Defendant was convicted in the Criminal Court, Sullivan County, Edgar P. Cal-

houn, J., of first-degree murder, and he appealed. The Supreme Court, Drowota, J., held that: (1) defendant was not prejudiced by indictment's reference to his alias; (2) probative value of key ring bearing letters "KKK" outweighed any prejudicial effect of admitting it into evidence; (3) use of evidence of robbery to establish first-degree murder and to show aggravating circumstance for purposes of imposition of death sentence was proper and did not violate defendant's right to be free from double jeopardy; (4) though trial court erred in not limiting aggravating circumstance instruction to robbery, such error was not prejudicial in that robbery was only aggravating circumstance which evidence supported; and (5) imposition of death sentence was not cruel and unusual punishment, despite defendant's alleged low intelligence.

Affirmed.

Brock, J., concurred in part and dissented in part with opinion.

1. Criminal Law ⇐1167(3)
Indictment and Information ⇐137(1)

In first-degree murder prosecution, though trial court should have granted defendant's motion to strike reference to defendant's alias in indictment in that no evidence was presented to establish that defendant used an alias, defendant was not prejudiced by court's failure to grant such motion, as evidence presented by State clearly established defendant's guilt; moreover, defendant's motion to strike came after entire jury was empaneled and after jury was aware of the alias, and was thus too late.

2. Criminal Law ⇐404(4)

In first-degree murder prosecution, probative value of key ring bearing letters "KKK" outweighed any prejudicial effect in that the keys were probative in showing plan of defendant in that they were necessary to link defendant with car which keys fit and which was waiting near scene of crime.

3. Criminal Law ⇐163

In first-degree murder prosecution, evidence of robbery used at trial to establish murder in the first degree could also be used at sentencing hearing to show aggravating circumstance to first-degree murder to justify imposition of sentence of death, without violating defendant's right to be free from double jeopardy. U.S.C.A. Const. Amend. 5.

4. Criminal Law ⇐1172.9

In first-degree murder prosecution in which State relied upon robbery as aggravating circumstance justifying imposition of death penalty, though trial court erred in not limiting instruction to robbery as aggravating circumstance and in including other sections of statute governing aggravating circumstances in the instruction, such error was not prejudicial to defendant, in that jurors returned verdict of felony-murder, the only aggravating circumstance which evidence supported; although jury did not state specifically the felony which aggravated the murder, it was clear they intended attempted robbery as that felony. T.C.A. § 39-2404(i)(1)(7) (now § 39-2-203(i)(1)(7)).

5. Criminal Law ⇐814(1)

Trial court must charge jurors narrowly, giving them guidance on law to be applied to facts which are reasonably raised by the evidence.

6. Criminal Law ⇐1213

In first-degree murder prosecution, death sentence was not cruel and unusual punishment, despite defendant's alleged low intelligence, in that evidence showed that defendant possessed mental capability to plan, commit and attempt to cover up in his involvement in the crime, and that he was sane at time of murder. U.S.C.A. Const. Amend. 8.

7. Criminal Law ⇐740

Once a defendant is adjudged capable of standing trial for offense, it is jury's province to consider diminished capacity as a defense to the crime or as a mitigating circumstance.

Cite as 654 S.W.2d 385 (Tenn. 1983)

8. Criminal Law ⇐1144.15

Where jurors had been instructed as to defense of diminished capacity of defendant in first-degree murder prosecution, Supreme Court would assume that jury considered diminished capacity of defendant before reaching their verdict.

Bob McD. Green, Johnson City, for appellant.

William M. Leech, Jr., Atty. Gen. & Reporter, Robert L. Jolley, Jr., Senior Asst. Atty. Gen., Nashville, for appellee.

OPINION

DROWOTA, Justice.

In this case, the Defendant, Thomas Gerald Laney, appeals directly to this Court his conviction of first degree murder and the sentence of death imposed by the jury. He presents six issues for our consideration. After a careful review of the entire record, we find all to be without merit. We, therefore, affirm the conviction and the sentence.

Around 10:30 p.m., October 16, 1980, Suleiman Showkeir, a Kingsport grocer, was shot four times at his home. Only moments before the shooting, he had returned home from work, and he was about to enter his house from the carport.[1] Although mortally wounded, he managed to pull himself into the kitchen of his home. His wife and twelve-year-old son attempted to call for help from a phone in their home, but they found the line dead.[2] Mrs. Showkeir drove to a nearby store to seek assistance. It was later discovered the phone lines had been cut. She returned to find the Defendant lying unconscious and face down in a pool of blood in the carport. He had been shot four times, once in the head, apparently by Showkeir, who also had a gun. Laney was wearing a clear plastic Halloween mask, and a .38 caliber revolver was found approximately six inches from his right hand. Showkeir died from internal bleeding.

While in the hospital, the Defendant stated he did not remember anything about what had happened. He insisted he had been driving around after drinking with acquaintances. The Defendant's evidence showed that at the time he entered the hospital his blood alcohol content was .15, a level described as capable of having an effect on a man from "barely discernible to almost stupor." The State introduced into evidence a knife and car keys on a key ring bearing the letters "KKK" and the phrase "member in good standing." The knife and keys had been removed from Defendant's pocket by a nurse at the hospital. The keys started the engine of a car which had been parked on a road near the Showkeir home on the night of the shooting. The fence along the highway was down near the place where the car stood. The Defendant's fingerprints were on the car. This evidence tended to negate the Defendant's insistence that he knew nothing about what had happened. And it seems the jury accepted the State's evidence as establishing a planned ambush. Bullets taken from the deceased's body and from the walls of his house bore marks like those on bullets fired from Laney's gun.

The jury, on April 10, 1981, returned a conviction of murder in the first degree on this evidence. On appeal, the Defendant does not challenge the sufficiency of the evidence to support the conviction.

The sentencing phase of the trial began on April 11, 1981. At the hearing, the State relied on the evidence it had presented during the guilt phase of the trial. The Defendant introduced the testimony of Donald Jones, a professor of psychology at East Tennessee State University. The professor testified that the Defendant's overall IQ was 72, which he described as the borderline mentally retarded range. On cross-exami-

1. Suleiman Showkeir and his wife, Zahad, owned and operated City Grocery for 14 years. They worked six days a week and Mr. Showkeir opened the store at 8:00 a.m. and closed the store each day between 10:00 and 10:30 p.m.

2. The phone was in working order at 10:20 p.m., for Mrs. Showkeir had been talking to her sister in Lubbock, Texas.

nation, Mr. Jones stated that the Defendant was capable of planning, committing, and attempting to cover up this crime; that the Defendant met the *Graham*[3] test although his intelligence limited his ability to conform his conduct to the law; and that the circumstances under which the IQ test was taken could have had some effect on the score. The Defendant's remaining evidence tended to establish that he was a "follower," that he had difficulty in school and that he dropped out of junior high school. Dr. Wendell Skinner, of the hospital where the Defendant was treated for his gunshot wounds, testified to the Defendant's injuries. He also testified the Defendant seemed normal mentally.

At the conclusion of the evidence, the trial judge instructed the jury on all statutory aggravating and mitigating circumstances. The trial judge's instructions were taken from § 39-2404[4] of the Tennessee Code Annotated (1975). The jury returned the sentence of death by electrocution with the following finding:

> We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances: The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.
>
> We, the jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above. Therefore, we, the jury, unanimously find that the punishment for the Defendant, Thomas Gerald Laney, shall be death.

The trial court accepted the sentence and imposed it on the Defendant. The Defendant's motion for a new trial was overruled.

[1] The Defendant asserts two errors committed by the trial judge during the guilt phase of his trial. The grand jury's indictment charged "Thomas Gerald Laney alias 'Hustler' " with murder in the first degree. The judge refused, on Defendant's motion, to strike the alias from the indictment. The Defendant argues the failure to prevent the State from using the alias was error because the nickname or alias was used by the State in an attempt to inflame and prejudice the jury and the alias was of no relevance to any material issue at trial. In *Malicoat v. State*, 539 S.W.2d 54, 56 (Tenn.Cr.App.1976), the court held it error to include the word "alias" in an indictment when no proof was offered of use of an alias by the accused. That error did not warrant reversal, however. In the present case, we find no evidence presented to establish that the Defendant used an alias, and so the court should have granted the motion to strike. But the Defendant was not prejudiced by the alias, as the evidence presented by the State clearly establishes his guilt. The jury's verdict rests squarely within the bounds of the evidence; hence, it cannot reasonably be argued the jury was inflamed. Moreover, we note the Defendant's motion to strike came after the entire jury was impaneled and after the jury was aware of the alias. We think the motion was late.

[2] The Defendant argues the trial court erred in admitting the key ring bearing the letters "KKK" into evidence. He asserts the effect of the inference of the Ku Klux Klan membership was to prejudice the jury. We cannot agree. The keys were probative in showing the plan of the Defendant. They, of course, were necessary to link the Defendant with the waiting car. And in this connection, the State's theory of robbery was strengthened, and the Defendant's defenses of intoxication and lack of mental capacity were weakened. The probative value of the keys outweighed any prejudicial effect. From our review of the

3. *Graham v. State*, 547 S.W.2d 531 (Tenn. 1977).

4. Now T.C.A. § 39-2-203 (1982).

record, it appears the inscriptions on the key ring were called to the attention of the jury by defense counsel during his closing argument. Before that time, the jury had no cause to know of the inscriptions on the ring, as the State did not mention it, and it does not appear that the keys were passed among the jurors. So any prejudice in the minds of the jurors was created by the Defendant himself.

[3] The Defendant's remaining arguments concern the sentencing phase of his trial. He points out the State relied upon the same evidence during the sentencing hearing as it relied upon during the guilt phase. At the sentencing hearing, the State used the evidence establishing robbery to show an aggravating circumstance for a sentence of death. The Defendant argues that since this evidence was relied upon during the guilt phase of the trial to establish murder in the first degree, and since, in the absence of the felony murder evidence at the guilt phase, Defendant would have been guilty of no more than second degree murder,[5] this evidence cannot show aggravating circumstances as it is not "additional" evidence.

We recently rejected this argument in *State v. Pritchett*, 621 S.W.2d 127, 140 (Tenn.1981). In *Pritchett*, the defendant cited this Court to a North Carolina Supreme Court case [6] in which that court held once the underlying felony had been used to obtain a conviction of first degree murder, it became an element of that crime and could not thereafter be the basis for additional prosecution or sentence. We declined to follow the reasoning of our sister state, noting that the U.S. Supreme Court, in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), implicitly approved the use of robbery, which was committed as a part of the act of murder, as a valid aggravating circumstance to support the imposition of death.[7] Our research turns up no subsequent U.S. Supreme Court case which would require that we overrule our holding in *Pritchett*.

Second, the Defendant argues the use of felony murder as an aggravating circumstance in a charge of murder violates the Defendant's right to be free from double jeopardy. The Defendant's argument is essentially the same as that of the defendant in *Houston v. State*, 593 S.W.2d 267, 275–277 (Tenn.1980). In *Houston*, the defense asserted that T.C.A. § 39–2404 provided for an automatic sentence of life imprisonment at the conclusion of the trial on the issue of guilt. The defense argued the proceeding following the jury's finding of guilt for murder in the first degree is something other than a true sentence hearing, but is, rather, a proceeding for the enhancement of punishment or a trial for a separate and distinct crime of "aggravated first degree murder." We rejected this argument in *Houston*, stating:

> The basic fault with appellant's reasoning is that the Act does not provide for an "automatic life sentence," in any sense other than that life imprisonment is the minimum sentence for first degree murder. No sentence is imposed or can be imposed by the jury until after the "sentencing hearing." T.C.A. § 39–2404(a). The standards provided in T.C.A. § 39–2404 are not elements of the offense but establish guidelines for the exercise of the jury's discretion in determining punishment. Notice of the only aggravating circumstances which can be relied on by the state is provided in T.C.A. Section 39–2404(i). Under the holding in *Spinkellink v. Wainwright*, 578 F.2d 582, 609–610 (5th Cir.1978), *Cert. Denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796, this statutory notice is sufficient to meet the constitutional requirement of due process.

593 S.W.2d at 276. The Defendant raises no new legal arguments to show the statute

5. The indictment charged the Defendant with killing the deceased during the attempted perpetration of a robbery.

6. *State v. Cherry*, 298 N.C. 86, 257 S.W.2d 551 (1979).

7. *See also, Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

is constitutionally infirm. On the authority of *Houston*, we find the Defendant's argument lacks merit.

[6] The Defendant argues that the trial judge erred in instructing the jury on eleven of the twelve statutory aggravating circumstances,[8] when the evidence supported only one. T.C.A. § 39-2404(e) provides, "[T]he trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt or sentencing hearing, or both." The State concedes the instructions were improper but maintains they did not prejudice the Defendant's trial. We agree. In *State v. Pritchett*, *supra*, the trial judge charged T.C.A. § 39-2404(i)(5)[9] and § 39-2404(i)(7),[10] in its entirety, to the jury. The evidence supported only robbery as an aggravating circumstance. We held it error for the trial judge to instruct the jury on § 5, since the evidence did not support the instruction. We reversed because the jury returned a verdict on § 5, which verdict was clear error. Since the jury weighs mitigating circumstances against aggravating circumstances, we had no way of knowing and could not speculate whether the jury would have imposed the death penalty with one of the two aggravating circumstances withdrawn from its consideration. Thus, we found the court's error prejudiced the defendant's trial. Although the trial court's charging all the felonies included in § 7 was not reversible error in the absence of prejudice shown, we noted the instruction was much too broad and directed the trial court, on remand, to instruct the jury as follows:

> The murder was committed while defendant was engaged in committing, or was attempting to commit robbery. Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear.

621 S.W.2d at 140. A similar instruction should have been given in the present case, since robbery is the felony relied upon by the State. Moreover, as felony murder is the only statutory aggravating circumstance supported by the evidence and relied upon by the State, the other sections of T.C.A. § 39-2404(i) should not have been charged to the jury.

The purpose of jury instructions is to inform the jury of the law to be applied to certain facts. To charge the jurors on all possible aggravating circumstances violates this purpose. And, what is more, such a charge invites the jurors to speculate, and it creates uncertainty and confusion in their minds. The absence of proper legal guidance invites, also, a certain degree of capriciousness in the deliberation. We find no prejudice in the present case, however, because the jurors returned a verdict of felony murder, the only aggravating circumstance which the evidence supports. And, although the jury did not state specifically the felony which aggravated the murder, it is clear they intended attempted robbery as that felony. The record shows the jurors were familiar with the indictment which charged the Defendant with murder "during the attempted perpetration of a robbery . . ." The court defined robbery during the instructions at the guilt phase of the trial. The State, in its closing argument at the sentencing hearing, repeatedly referred to attempted robbery as the felony relied upon. From all the record, it is plainly evident the jurors were aware this case involved attempted robbery and not air-

8. T.C.A. § 39-2404(i), now T.C.A. § 39-2-203(i). The old numbering will be used throughout this opinion.

9. "(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind."

10. That section provides: "The murder was committed while the defendant was engaged in committing, or was an accomplice in committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb."

craft piracy or kidnapping or arson or any of the other irrelevant felonies in § 7.

[5] While no prejudice resulted from the broad instructions given the jury, one need only review *Pritchett* and *State v. Moore*, 614 S.W.2d 348 (Tenn.1980), to see the judicial inefficiency and delay which results when prejudice is found. A new sentencing trial is required with a new jury. Since that jury is not familiar with the guilt evidence, it is possible substantial portions of that evidence will have to be presented. This takes time; it costs the State; it denies the Defendant's interest and our society's interest in having an end to the cumbersome criminal proceedings. Under our supervisory power, we direct trial courts to charge jurors narrowly, giving them guidance on the law to be applied to facts which are reasonably raised by the evidence.

[6-8] Last, we address the Defendant's argument that, considering his low intelligence, the sentence of death is cruel and unusual. The evidence shows the Defendant possessed the mental capability to plan, commit and attempt to cover up his involvement in the crime. The evidence shows the Defendant was sane at the time of the murder, as sanity is defined by this Court in *Graham v. State*, 547 S.W.2d 531 (Tenn. 1977). This is all the law requires to hold a person accountable for his actions. Once a defendant is adjudged capable of standing trial for his offense, it is the jury's province to consider any diminished capacity as a defense to the crime or as a mitigating circumstance. T.C.A. § 39-2404(j)(8) was read to the jury, and it provides for the consideration of whether

> [t]he capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

The jurors having been instructed, we must assume they considered any diminished capacity of the Defendant before reaching their verdict.

We have held a sentence of death is not cruel and unusual punishment in violation of the state and federal constitutions. *See Houston v. State*, 598 S.W.2d 267, 276 (Tenn.1980), cert. denied, 449 U.S. 891, 101 S.Ct. 251, 66 L.Ed.2d 117 (1980).

The Defendant's conviction of first degree murder and sentence of death are affirmed. The date of execution is fixed for September 27, 1983, unless stayed or otherwise ordered by this Court or other proper authority. Costs are assessed to Appellant.

FONES, C.J., and COOPER and HARBISON, JJ., concur.

BROCK, J., concurs in part and dissents in part.

BROCK, Justice, concurring in part and dissenting in part.

For the reasons stated in my dissent in *State v. Dicks*, Tenn., 615 S.W.2d 126 (1981), I would hold that the death penalty is unconstitutional; but, I concur in all other respects.

STATE of Tennessee, Appellee,

v.

Charles BRYANT and Larry Bryant, Appellants.

Supreme Court of Tennessee, at Knoxville.

July 18, 1983.

Defendants were convicted in a joint trial before the Criminal Court, Monroe County, James C. Witt, J., of armed robbery and of possessing a sawed-off shotgun, and they appealed. The Supreme Court, Drowota, J., held that failure to give instruc-

when there is a dispute in the testimony of the witnesses. Wilson v. State, 574 S.W.2d 52 (Crim. App. 1978).

The degree of homicide in the killing was for the jury to determine as shown by the facts. Wilson v. State, 574 S.W.2d 52 (Crim. App. 1978).

The question of a defendant's sanity or insanity at the time of a crime is one for the jury to resolve from the facts and circumstances present in a case upon proper instructions from the court. McDonald v. Tennessee, 486 F. Supp. 550 (M.D. Tenn. 1980).

Question of malice is for the jury's determination as to the issue of self-defense. State v. Venable, 606 S.W.2d 298 (Tenn. Crim. App. 1980).

The issues of self-defense and degree of homicide are for the jury to decide in the light of all of the circumstances of the killing. State v. Gilbert, 612 S.W.2d 188 (Tenn. Crim. App. 1980).

16. Indictment.

Where the indictment under which defendant was convicted of second degree murder clearly set out the common law offense of first degree murder, without reference to § 39-2402 or any other statute, the court held that it was not demurrable or subject to motion to quash on the ground that § 39-2402 as amended by P.A. 1973, ch. 192, §§ 1, 6 was unconstitutional (which it was held to be under Tenn. Const., art. 2, § 17, as broader in purview than its caption in State v. Hailey (1974), — Tenn. —, 507 S.W.2d 712), and that any question as to punishment for first degree murder was mooted by the verdict of second degree murder. Bramlett v. State (1974), — Tenn. —, 515 S.W.2d 895.

Where an indictment clearly set out the common law offense of first degree murder without reference to this section or § 39-2402, second degree murder was an included offense thereunder as a matter of law. Bramlett v. State (1974), — Tenn. —, 515 S.W.2d 895.

17. Conduct of Court and Counsel.

In prosecution resulting in conviction of second-degree murder, the trial judge's allowing the defenses of self-defense and defense of habitation but instructing defendant's attorney not to argue the theory of accidental death to the jury was error which required a retrial of the case. Drake v. State, 575 S.W.2d 993 (Crim. App. 1978).

Decisions Under Prior Law

1. Vehicular Homicide.

Driving an automobile while under the influence of an intoxicant is malum in se and supplies the criminal intent necessary to sustain a conviction. Farr v. State, 501 S.W.2d 449 (Tenn. Crim. App. 1973).

The driving of a motor vehicle in willful or wanton disregard for safety of persons or property is malum in se. Farr v. State, 501 S.W.2d 449 (Tenn. Crim. App. 1973).

The requisite element of malice may be, and in most vehicular homicide cases, must be, supplied from the surrounding circumstances. Farr v. State, 501 S.W.2d 449 (Tenn. Crim. App. 1973).

Collateral References. Degree of homicide as affected by accused's religious or occult belief in harmlessness of ceremonial ritualistic acts directly causing fatal injury. 78 A.L.R.2d 1122.

Homicide as affected by lapse of time between injury and death. 60 A.L.R.3d 1323.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour. 93 A.L.R.3d 925.

39-2404. Punishment for murder in first degree — Sentencing proceeding — New trial. — (a) Upon a trial for murder in the first degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix punishment as part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt, subject to the provisions of subsection (k) relating to certain retrials on punishment.

APPENDIX "B"

(b) In the sentencing proceeding, the attorney for the state shall be allowed to make an opening statement to the jury and then the attorney for the defendant shall also be allowed such statement, provided that the waiver of opening statement by one party shall not preclude the opening statement by the other party.

(c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the state of Tennessee.

(d) In the sentencing proceeding, the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing.

(e) After closing arguments in the sentencing hearing, the trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt or sentencing hearing, or both. These instructions and the manner of arriving at a sentence shall be given in the oral charge and in writing to the jury for its deliberations.

(f) If the jury unanimously determines that no statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable doubt but that said circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. The jury shall then return its verdict to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF LIFE IMPRISONMENT

(1) We, the jury, unanimously find that the punishment shall be life imprisonment.

/s/ _____ /s/ _____
Jury Foreman Juror

/s/ _____ /s/ _____
Juror Juror

/s/ _____ /s/ _____
Juror Juror

/s/ _____ /s/ _____
Juror Juror

/s/_____ /s/_____
Juror Juror
/s/_____ /s/_____
Juror Juror

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. If the death penalty is the sentence of the jury, the jury shall (1) reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found and (2) signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found. These findings and verdict shall be returned to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF DEATH

(1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances:

[Here list the statutory aggravating circumstance or circumstances so found]

(2) We, the jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore, we, the jury, unanimously find that the punishment shall be death.

/s/_____ /s/_____
Jury Foreman Juror
/s/_____ /s/_____
Juror Juror
/s/_____ /s/_____
Juror Juror
/s/_____ /s/_____
Juror Juror
/s/_____ /s/_____
Juror Juror
/s/_____ /s/_____
Juror Juror

(h) If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

(1) The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.

(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.

(3) The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.

(4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

(8) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.

(9) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties.

(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupied said office.

(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.

(12) The defendant committed "mass murder" which is defined as the murder of three or more persons within the state of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan.

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or advanced age of the defendant at the time of the crime;

(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

(k) Upon motion for a new trial, after a conviction of first degree murder, if the court finds error in the trial determining guilt, a new trial on both guilt and sentencing shall be held, but if the court finds error alone in the trial determining punishment, a new trial on the issue of punishment alone shall be held by a new jury empanelled for said purpose. In the event that the trial court, or any other court with jurisdiction to do so, orders that a defendant convicted of first degree murder (whether the sentence is death or life imprisonment) be granted a new trial, either as to guilt or punishment or both, said new trial shall include the possible punishments of death or life imprisonment. [Code 1858, § 4600 (deriv. Acts 1829, ch. 23, § 3); Shan., § 6441; Code 1932, § 10770; Acts 1977, ch. 51, § 2; 1981, ch. 33, § 1.]

Amendments. The 1981 amendment added subsection (k)(12).

Effective Dates. Acts 1981, ch. 33, § 2. March 19, 1981.

Law Reviews. Criminal Law in Tennessee in 1979 — A Critical Survey, III. Procedure (Joseph G. Cook), 48 Tenn. L. Rev. 15.

Justice on the Tennessee Frontier: The Williamson County Circuit Court 1810-1820, 32 Vand. L. Rev. 413.

The Death Penalty in Tennessee — Recent Developments (Roy B. Morgan, Jr.), 8 Mem. St. U.L. Rev. 107.

Cited: Claiborne v. State, 555 S.W.2d 414 (Crim. App. 1977).

NOTES TO DECISIONS

ANALYSIS

a. In general.
1. Constitutionality.
2a. Duty of judge as thirteenth juror.
4. Instructions.
14. Notice.
15. Evidence admissible.

a. In General.

This statute does not deprive the jury of any knowledge of relevant evidence, or aggravating circumstances or mitigating circumstances, necessary for them to fix punishment. It does no more than prevent the judge and counsel from informing the jury of the effect of its disagreement on which sentence should be imposed. The aftereffect of a jury's deliberation is not a proper consideration for the jury. Houston v. State, 593 S.W.2d 267 (Tenn. 1979).

1. Constitutionality.

See note under heading "Constitutionality," § 39-2406, Notes to Decisions, Miller v. State, 584 S.W.2d 28 (Tenn. 1979).

This state is not prohibited from imposing the death penalty in the manner set forth in § 39-2402 et seq. by the restrictions placed on it by the U.S. Const., 8th and 14th amends., and by Tenn. Const., art. 1, §§ 9 and 16. Houston v. State, 593 S.W.2d 267 (Tenn. 1979).

This state is not prohibited from imposing the death penalty in the manner set forth in this and the following sections. Cozzolino v. State, 584 S.W.2d 765 (Tenn. 1979).

To allow a bifurcated trial in all capital cases in which circumstances mitigating punishment may be shown while a unitary trial is required on not guilty pleas before a jury does not show an irrational or unreasonable classification amounting to a denial of equal protection. Scalf v. State, 565 S.W.2d 506 (Crim. App. 1978).

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

NO. 83-5533

THOMAS GERALD LANEY,

PETITIONER,

V.

STATE OF TENNESSEE,

RESPONDENT.

ON PETITION FOR THE WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM M. LEECH, JR.
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QUESTIONS PRESENTED FOR REVIEW

I. Whether the issue of jury selection should be reviewed on certiorari, when it was not raised by petitioner in the lower court?

II. Whether the use of the "felony murder" aggravating circumstance in a felony murder case violates the defendant's right against double jeopardy?

III. Whether the issue of the burden of proof at the sentencing hearing should be reviewed on certiorari, when it was not raised in the lower court?

IV. Whether the record supports the finding of the Tennessee Supreme Court that jury instructions on unsupported aggravating circumstances were harmless error?

V. Whether imposition of the death penalty in Petitioner's case would constitute cruel and unusual punishment in violation of the Eighth Amendment?

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TABLE OF AUTHORITIES

OPINION BELOW

The opinion of the Supreme Court of Tennessee, affirming Petitioner's conviction and sentence, is reported at 654 S.W.2d 383.

JURISDICTION

Petitioner seeks review of the judgment of the Supreme Court of Tennessee, affirming his conviction of murder in the first degree and his sentence of death. The judgment was entered on June 27, 1983, and a petition for rehearing was denied on August 1, 1983. The Petition for Writ of Certiorari has been timely filed with this Court, and was received by the Respondent on October 3, 1983. The Supreme Court of Tennessee has indefinitely stayed Petitioner's execution pending the disposition of this proceeding before this Court.

Petitioner seeks review pursuant to 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The victim in this case, Suleiman Showkeir, owned and operated a grocery store and regularly arrived home each night between 10:30 and 10:45. On the night of October 16, 1980, he was ambushed in his carport by Petitioner, who shot Showkeir four times. The assault was apparently planned, since Petitioner was in possession of keys to a car parked near the Showkeir home, and the phone lines to the house had been severed within minutes before the shooting.

There was little doubt as to Petitioner's identity as the murderer, since the victim was able to return his his gunfire, and Petitioner was found lying on the floor of the carport in a pool of blood. He was charged with murder in the first degree (felony murder) in an indictment filed on

December 11, 1980, and was recharged in a presentment filed on March 5, 1981. He was found guilty as charged by a jury on April 10, 1981.

At a separate sentencing hearing held on April 11, 1981, the State relied on the evidence it had presented during the guilt phase of the trial. A professor of psychology testified that Petitioner's overall I.Q. was 72, in the borderline retarded range. His I.Q. test results, however, were in the low normal range with respect to nonverbal areas, and he possessed the intelligence to plan, commit, and attempt to cover up the murder. The psychologist also admitted that the "terrible" circumstances under which the I.Q. test was given could have lowered the score.

The trial judge instructed the jury on all of the statutory aggravating and mitigating circumstances set forth in Tenn. Code Ann. § 39-2-203(i) and (j). In sentencing Petitioner to death, the jury specified only one of the statutory aggravating circumstances, i.e., that the murder was committed while the defendant was engaged in committing or was attempting to commit a specified felony. Tenn. Code. Ann. § 39-2-203(i)(7). The jury further found, as required by statute, that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance which they had found. Tenn. Code Ann. § 39-2-203(g).

A direct appeal was taken to the Supreme Court of Tennessee, which affirmed the conviction and sentence. No issues were presented by petitioner concerning selection or qualification of the jurors. Petitioner attacked the constitutionality of the "felony murder" aggravating circumstance on two grounds, arguing that the statute's use of the word "aggravating" requires additional evidence in a case where culpability is based on a theory of felony murder, and that

use of the aggravating circumstance violated double jeopardy principles. He did not, however, contend that the burden of proof had been impermissibly shifted to him. He also argued that the trial judge had erred in instructing the jury on all of the aggravating circumstances even though they were not supported by the evidence, and that his particular circumstances made infliction of the death penalty in his case cruel and unusual punishment.

The Supreme Court of Tennessee rejected Petitioner's attacks on the aggravating circumstance and found that the death penalty in this case did not violate the Eighth Amendment. The court agreed with Petitioner that it was improper for the trial judge to instruct the jury on all of the aggravating circumstances, but found no prejudice to the Petitioner's in the instance case because the jurors clearly relied on the only aggravating circumstance supported by the evidence. State v. Laney, 654 S.W.2d 383 (Tenn. 1983).

REASONS FOR DENYING THE WRIT

I. PETITIONER FAILED TO RAISE THE JURY SELECTION ISSUE IN THE TENNESSEE SUPREME COURT, AND THEREFORE THE ISSUE IS INAPPROPRIATE FOR REVIEW BY THIS COURT.

The first issue raised by Petitioner in his application for the writ is his contention that one of the potential jurors should not have been dismissed for cause on the basis of her views about the death penalty. See Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Petitioner did not, however, present this issue to the Tennessee Supreme Court, and that court did not address the issue.

It has long been the settled rule of this Court and other appellate courts that an issue which has not been raised in the lower courts will not be addressed or decided on appeal. United States v. Ortiz, 422 U.S. 891, 898, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975); Walters v. City of St. Louis, 347 U.S.

231, 233, 74 S.Ct. 505, 98 L.Ed. 660 (1954). The rules of this Court governing review on certiorari also clearly contemplate that any issue raised on certiorari has been decided by the state court whose decision is being appealed. U.S. Sup. Ct. R. 17.1(b) and (c).

The lack of a ruling in the lower court on Petitioner's jury selection issue makes review by this Court on certiorari inappropriate and the writ of certiorari should therefore be denied.

II. USE OF THE "FELONY MURDER" AGGRAVATING CIRCUMSTANCE DID NOT VIOLATE PETITIONER'S RIGHT AGAINST DOUBLE JEOPARDY.

Petitioner's argument that use of the "felony murder" aggravating circumstance, Tenn. Code Ann. § 39-2-203(i)(7), violated his right against double jeopardy is patently without merit. The sentencing hearing did not constitute a "trial" for double jeopardy purposes, but rather was simply a punishment proceeding. The fact that the jury relied upon elements of the crime in determining their sentence certainly does not mean that Petitioner was tried twice in violation of the Fifth Amendment. Otherwise no sentencing authority could ever rely on elements of the crime in determining the sentence therefor.

As noted by the Tennessee Supreme Court in the instant case, that court has been presented with a similar argument in the past, and this Court denied review. See Houston v. State, 593 S.W.2d 267, 275-276 (Tenn. 1980), cert. denied 449 U.S. 891 (1980). In another case which has not been appealed to this Court, State v. Pritchett, 621 S.W.2d 127, 140-141 (Tenn. 1981), the Tennessee Supreme Court addressed and rejected an argument nearly identical to the argument raised by petitioner in the instant case, relying on this Court's implicit approval of Florida's very similar aggravating circumstance. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

The State notes that Petitioner has not raised any Eighth Amendment challenge to the use of the "felony murder" aggravating circumstance, which might be based on a lack of premeditation or intent to commit the felony murder. Cf. Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). Had that issue been raised, this case would be a poor one on which to decide the question. Although Petitioner was convicted of felony murder, there was clear evidence of premeditation and intent to kill, including obvious proof that petitioner had planned the crime in advance, had carried with him a loaded pistol, and shot the victim not once but four times.

III. THE ISSUE OF WHETHER TENNESSEE'S DEATH PENALTY STATUTE SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT WAS NOT RAISED IN THE LOWER COURT, AND THEREFORE IS INAPPROPRIATE FOR REVIEW ON CERTIORARI.

While Petitioner made several attacks on the constitutionality of the death penalty in the Tennessee Supreme Court, his argument that the burden of proof was shifted to him was not presented there. As noted in Part I above, the issue is therefore inappropriate for certiorari review by this Court.

In any event, it is clear that the Tennessee death penalty statute does not shift the burden of proof to the defendant. The statute specifies that the State must prove the existence of statutory aggravating circumstances beyond a reasonabel doubt before the death penalty may be imposed. Tenn. Code Ann. § 39-2-203(f). The Tennessee Supreme Court has so interpreted this statute. State v. Dicks, 615 S.W.2d 126, 130-131 (Tenn. 1981), cert. denied 454 U.S. 933 (1981). The mere fact that the State may rely on evidence adduced at the guilt phase of the trial to carry its burden certainly does not mean that the burden itself has shifted.

IV. THE RECORD SUPPORTS THE FINDING OF THE TENNESSEE SUPREME COURT THAT INSTRUCTIONS TO THE JURY ON UNSUPPORTED AGGRAVATING CIRCUMSTANCES WERE HARMLESS ERROR.

The trial judge instructed the jury at the sentencing hearing on all of the statutory aggravating circumstances set forth in Tenn. Code Ann. § 39-2-203(i), even though most of them were not supported by the evidence. Nevertheless, the jury returned a sentence of death based on a specific finding of one supported aggravating circumstance. The Tennessee Supreme Court correctly found that the instructions were too broad, and commented at length on the proper procedure which should be followed in future trials. The court found, however, that petitioner was not prejudiced by the broad instructions.

> We find no prejudice in the present case, however, because the jurors returned a verdict of felony murder, the only aggravating circumstance which the evidence supports. And, although the jury did not state specifically the felony which aggravated the murder, it is clear they intended attempted robbery as that felony. The record shows the jurors were familiar with the indictment which charged the Defendant with murder "during the attempted perpetration of a robbery . . .." The court defined robbery during the instructions at the guilt phase of the trial. The State, in its closing argument at the sentencing hearing, repeatedly referred to attempted robbery as the felony relied upon. From all the record, it is plainly evident the jurors were aware this case involved attempted robbery and not aircraft piracy or kidnapping or arson or any of the other irrelevant felonies in [the felony murder aggravating circumstance].

654 S.W.2d at 388-389.

The State submits that the record supports this factual finding by the Tennessee Supreme Court. Furthermore, the question of whether Petitioner was prejudiced by the erroneous instructions is largely one of state evidentiary law, and therefore is not appropriate for certiorari review by this Court.

V. IMPOSITION OF THE DEATH PENALTY UNDER THE CIRCUMSTANCES OF THIS CASE DID NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

To the extent that Petitioner complains in this issue that mitigating circumstances outweighed aggravating circumstances in his case, the Tennessee Supreme Court has credited the jury's factual finding on this ground. The jury was instructed to consider mitigation on the grounds that Petitioner was intoxicated or mentally incapacitated at the time of the crime, and the jury specifically found that these mitigating circumstances did not outweigh the statutory aggravating circumstances. "The jurors having been instructed, we must assume they considered any diminished capacity of the Defendant before reaching their verdict." 654 S.W.2d at 389. The jury's findings were supported by evidence that petitioner retained sufficient intelligence and sobriety to plan and commit the murder in the instant case.

To the extent that Petitioner is alleging that execution of him in his present mental condition would violate the Eighth Amendment, the State responds that his claim is without merit. The Fifth Circuit has recently held that the Eighth Amendment is not implicated in the execution of an allegedly insane person at least where that person is aware of his surroundings, etc. Gray v. Lucas, 710 F.2d 1048, 1054-1056 (5th Cir.), cert. denied ___ U.S. ___, 52 U.S.L.W. 3169 (1983). The Petitioner in the instant case falls far short of meeting the tests discussed in Gray.

CONCLUSION

For these reasons, the State of Tennessee respectfully requests that the petition for the writ of certiorari be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first class U.S. mail, postage prepaid, to Mr. Bob McD. Green, 204 East Unaka Avenue, P.O. Box 28, Johnson City, TN 37601, on this the 1st day of November, 1983.

ROBERT A. GRUNOW
Deputy Attorney General
Counsel of Record